BELLSOUTH OPPOSITION

WC DOCKET NO. 02-238

EXHIBIT J

PART 1 OF 5

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by BellSouth Telecommunications, Inc. for arbitration of certain issues in interconnection agreement with Supra Telecommunications and Information Systems, Inc.	DOCKET NO. 001305-TP ORDER NO. PSC-02-0413-FOF-TP ISSUED: March 26, 2002

The following Commissioners participated in the disposition of this matter:

LILA A. JABER, Chairman
BRAULIO L. BAEZ
MICHAEL A. PALECKI

APPEARANCES:

NANCY B. WHITE, and MICHAEL TWOMEY, BellSouth Telecommunications, Inc., c/o Nancy Sims, 150 South Monroe Street, Suite 400, Tallahassee, Florida 32301
On behalf of BellSouth Telecommunications, Inc.

BRIAN CHAIKEN, PAUL TURNER, and ADENET MEDACIER, 2620 West 27th Avenue, Miami, Florida 33133.
On behalf of Supra Telecommunications and Information Systems, Inc.

WAYNE KNIGHT, Florida Public Service Commission, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850
On behalf of the Commission.

FINAL ORDER ON ARBITRATION

LIST OF ACRONYMS

1996 Act or the ACT	Telecommunications Act of 1996
ADSL	Asymmetric Digital Subscriber Line
ADUF	Access Daily Usage File
ALEC	Alternative Local Exchange Company
AT&T	AT&T Communications of the Southern States, Inc.
BellSouth	BellSouth Telecommunications, Inc
BBR	BellSouth Business Rules
CCP	Change Control Process
CLEC	Competitive Local Exchange Company
CPNI	Customer Proprietary Network Information
CSOTS	CLEC Service Order Tracking System
CSR	Customer Service Record
DAML	Digitally Added Main Line
DLC	Digital Loop Carrier
DSL	Digital Subscriber Line
DSLAM	Digital Subscriber Line Access Multiplexer
ECTA	Electronic Communications Trouble Administration
EDI	Electronic Data Interchange
EEL	Enhanced Extended Loop
EODUF	Enhanced Optional Daily Usage File
FCC	Federal Communications Commission
FOC	Firm Order Commitment
ILEC	Incumbent Local Exchange Company
ISP	Internet Service Provider
IVMS	Inter-Switch Voice Messaging Service
IXC	Interexchange Company
LATA	Local Access and Transport Area
LENS	Local Exchange Navigation System
LFACS	Loop Facility Assignment Control System
LOA	Letter of Authorization
LSR	Local Service Request
MSA	Metropolitan Statistical Area
NTW	Network Terminating Wire
ODUF	Optional Daily Usage File
OSS	Operational Support Systems
PIU	Percent Interstate Usage
PLU	Percent Local Usage
RSAG	Regional Service Address Guide
RT	Remote Terminal
SMDI-E	Standard Message Desk Interface-Enhanced

SOCS	Service Order Communications System
Supra	Supra Telecommunications and Information Systems, Inc.
TAFI	Trouble Analysis and Facilities Interface
TAG	Telecommunications Access Gateway
TELRIC	Total Element Long Run Incremental Cost
UNE	Unbundled Network Element
VMS	Voice Messaging Service

CASE BACKGROUND

On September 1, 2000, BellSouth Telecommunications, Inc. (BellSouth) filed a petition for arbitration of certain issues in a new interconnection agreement with Supra Telecommunications and Information Systems, Inc. (Supra). BellSouth's petition raised fifteen disputed issues. Supra filed its response, and this matter was set for hearing. In its response Supra raised an additional fifty-one issues. In an attempt to identify and clarify the issues in this docket, issue identification meetings were held on January 8, 2001, and January 23, 2001. At the conclusion of the January 23 meeting, the parties were asked by our staff to prepare a list with the final wording of the issues as they understood them. BellSouth submitted such a list, but Supra did not, choosing instead to file on January 29, 2001, a motion to dismiss the arbitration proceedings. On February 6, 2001, BellSouth filed its response. In Order No. PSC-01-1180-FOF-TI, issued May 23, 2001, we denied Supra's motion to dismiss, but on our own motion ordered the parties to comply with the terms of their prior agreement by holding an inter-company Review Board meeting. Such a meeting was to be held within 14 days of the issuance of our order, and a report on the outcome of the meeting was to be filed with us within 10 days after completion of the meeting. The parties were placed on notice that the meeting was to comply with Section 252(b)(5) of the Telecommunications Act of 1996 (Act).

Pursuant to our Order, the parties held meetings on May 29, 2001, June 4, 2001, and June 6, 2001. The parties then filed post-meeting reports. Thereafter, several of the original issues were withdrawn by the parties. An additional twenty issues were withdrawn or resolved by the parties either during mediation or the hearing, or in subsequent meetings. Although some additional issues were settled, thirty-seven disputed issues remained. We are hopeful that negotiations between these parties will be more successful in future arbitrations.

We have jurisdiction pursuant to Section 252 of the Act to arbitrate interconnection agreements, as well as Sections 364.161 and 364.162, Florida Statutes. Section 252 states that a State Commission shall resolve each issue set forth in the petition and response, if any, by imposing the appropriate conditions as required. Further, while Section 252(e) of the Act reserves the state's authority to impose additional conditions and terms in an arbitration consistent with the Act and its interpretation by the FCC and the courts, we utilize discretion in the exercise of such

authority. In addition, Section 120.80(13)(d), Florida Statutes, authorizes this Commission to employ procedures necessary to implement the Act.

We held an administrative hearing in this matter on September 26-27, 2001. On February 8, 2002, our staff filed its post-hearing recommendation for our consideration at our February 19, 2002, Agenda Conference. Prior to the Agenda Conference, the item was deferred.

On February 13, 2002, Supra filed a Motion asking that the item not be considered until additional legal briefing could be had addressing the impact of the decision of the United States Court of Appeals, Eleventh Circuit (hereinafter "11th Circuit"), Cir. Order Nos. 00-12809 and 00-12810, the consolidated appeals of BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, Inc., D.C. Docket No. 99-00248-CV-JOF-1 and BellSouth Telecommunications, Inc. v. WorldCom Technologies, Inc. And E.spire Communications, Inc., D.C. Docket No. 99-00249-CV-JOF-1, respectively. In the alternative, Supra requested oral argument on the impact of that decision on Issue 1 of our staff's recommendation. By Order No. PSC-02-0202-PCO-TP, issued February 15, 2002, the request for additional briefing was granted. Parties were directed to file their supplemental briefs by February 19, 2002. We have considered the additional briefing in rendering our decision in this matter.

Also, on February 18, 2002, Supra filed a Motion for Rehearing, Motion for Appointment of a Special Master, Motion for Indefinite Deferral, and Motion for Oral Argument. BellSouth filed its response on February 21, 2002.

On February 21, 2002, Supra filed a Renewed Motion for Indefinite Stay of Docket No. 001305-TP, and an Alternative Renewed Motion for Oral Argument. On February 22, 2002, BellSouth filed its Response in opposition.

On February 27, 2002, Supra filed a Motion for Oral Arguments on Procedural Question Raised by Commission staff and Wrongful Denial of Due Process. BellSouth filed its Response in opposition on March 1, 2002.

Herein, we address the February 18, 21, and 27 Motions filed by Supra, as well as the issues presented for arbitration. We note that at our March 5, 2002, Agenda Conference at which we considered these matters, we granted the requests for oral

argument. We also allowed Supra to orally modify its Motion for Appointment of a Special Master to include the requested remedy of referring the case to the Division of Administrative Hearings.

I. Motions

A. Motion for Rehearing, Appointment of Special Master, and Indefinite Deferral

On February 18, 2002, Supra Telecommunications & Information Systems, Inc. (Supra) filed its Motion for Rehearing in Docket No. 001305-TP; Motion for the Appointment of a Special Master; Motion for an Indefinite Deferral. On February 20, 2002, BellSouth Telecommunications, Inc. filed its Response.

1. Arguments

a. Request for Rehearing

In support of its Motion for Rehearing, Supra states that pursuant to Rule 28-106.211, Florida Administrative Code, the presiding officer before whom a case is pending has the authority to grant a rehearing for appearance of impropriety. Supra notes that Order No. PSC-02-0143-PCO-TP, issued January 31, 2002, in Docket No. 001097-TP, addressed a situation in which one of our staff members was found to have provided cross-examination questions to BellSouth before the hearing scheduled for that docket. Supra further notes that the Order states "in order to remove any possible appearance of prejudice, I find that this matter should be afforded a rehearing."

Supra states that in Docket No. 001097-TP, on the eve of the evidentiary hearing in that docket, our staff member provided to a BellSouth employee a copy of draft cross-examination questions for BellSouth and Supra witnesses. Supra asserts that this staff member requested that the BellSouth employee advise the staff member as to which witnesses the draft cross-examination questions should be directed. Supra contends that it is likely that the BellSouth employee contacted this staff member because the draft questions were not forwarded to staff legal counsel until two hours later. Supra asserts that although the staff member indicated that a copy was sent to Supra, that cannot be verified. Further, Supra asserts that it never received a copy of the draft cross-examination questions.

Supra notes that after an internal staff investigation

regarding the situation, the Prehearing Officer issued Order No. PSC-02-0143-PCO-TP, which granted a rehearing in Docket No. 001097-TP. Supra cites the following findings from paragraph number 4 of the Order:

> Prior to the scheduled Agenda Conference, a **procedural irregularity** was brought to my attention, which prompted a deferral of the item . . . I directed further inquiry, and have since reviewed the findings of that inquiry. Although the inquiry has failed to disclose any prejudice to either party, **the Commission is sensitive to the mere appearance of impropriety. Accordingly, in order to remove any possible appearance of prejudice, I find that this matter should be afforded a rehearing.** (Emphasis in Motion)

Supra contends that although the Order did not find any prejudice to either party, it believes that this is contrary to the evidence and the circumstances surrounding the incident. Supra states that the staff member's misconduct was not disclosed to Supra until five months after the incident. Furthermore, Supra argues that this staff member had no reason to refrain from such behavior, which indicates a bias in favor of BellSouth. Supra maintains that a rehearing was the proper remedy because of the creation of the appearance of impropriety, even though the staff inquiry failed to disclose any prejudice.

Supra alleges that the same impropriety exists in Docket No. 001305-TP, which is Supra's only other case pending before us. Supra contends that it is undisputed that the same staff member who engaged in the aforementioned misconduct in Docket No. 001097-TP also participated in the instant docket, Docket No. 001305-TP, and was present at the two-day hearing in this docket. Supra contends that in this docket the staff member had a second opportunity to prejudice Supra, and that we cannot affirmatively state that this staff member did not provide BellSouth with cross-examination questions, or any other untoward assistance, before the evidentiary hearing in this docket.

Supra asserts that the above situation raises serious questions about the conclusion of our internal investigation that Supra was not prejudiced as a result of the staff member's actions, as well as serious questions involving the conduct of BellSouth and its employees, and its failure to immediately disclose to us the "illicit" relationship between its employee and the staff member. Citing Hernandez v. State, 750 So. 2d 50

(Fla. 3rd DCA 1999), Supra asserts that there are a long line of cases involving the appearance of impropriety which arises when an illicit relationship develops between adversarial parties.

Supra contends that while our staff is not a party to the proceedings, it does engage in conduct which is adversarial, as evidenced by this staff member's preparation of draft cross-examination questions for BellSouth and Supra for use by staff legal counsel in preparation for the hearing. Supra asserts that whether or not questions were prepared by this staff member in this docket, the staff member had access to cross-examination questions, documents, and "other Commission Staff information" which could have been used to assist BellSouth in its litigation against Supra. Supra argues that "this access and [the staff member's] bias in favor of BellSouth by all standards of common sense creates an actual conflict of interest between two individuals and two entities, this Commission and BellSouth - with divided loyalties."

Citing People v. Singer, 226 Cal. App. 3d 23 (1990), Supra asserts that "[t]he validity of our adversarial system depends upon the guaranty of this 'undivided loyalty and effort . . . ." Supra cites to Cuyler v. Sullivan, 466 U.S. 335, 349-351 (1980), for the proposition that the courts are clear that once "having found an actual conflict of interest, the Court must presume prejudice resulting therefrom." Supra further cites Cuyler, stating that "[a] defendant who shows that a conflict of interest actually affected the adequacy of representation need not demonstrate prejudice in order to obtain relief."

Supra argues that this legal conclusion by the courts raises serious and legitimate questions regarding the internal investigation's conclusion that the staff member's misconduct failed to disclose any prejudice in Docket No. 001097-TP. Supra further asserts that it need not demonstrate any prejudice in order to obtain relief but only that an actual conflict of interest exists. Supra contends that staff, in its recommendation to the Prehearing Officer, articulated the wrong standard regarding whether a rehearing was warranted in Docket No. 001097-TP, although Supra agrees with the Prehearing Officer's decision to require rehearing.

Supra contends that the cited cases are instructive because it shows the analysis a court would undertake in determining whether a new trial should be granted in a criminal context. Supra argues that if the standard is appropriate for a criminal context, then the standard should be sufficient in a civil

proceeding such as the one in the instant case.

Citing Reynolds v. Chapman at page 1343 (full citation not provided by Supra), Supra contends that once it is determined that an actual conflict exists, the Court then asks whether "a plausible alternative strategy" could have been pursued during any portion of the proceeding. Supra suggests that we should ask whether it is plausible that the staff may have pursued an alternative strategy or course of action during the discovery phase of this proceeding or during the evidentiary hearing. Supra concludes that we must conclude that "the plausible course of action was not followed because it conflicted with [this staff member's] external loyalties."

Supra cites to Zuck v. Alabama, 588 F.2d 436 (5th Cir. 1979), for the proposition that an actual conflict of interest occurs when an attorney places himself in a situation inherently conducive to divided loyalties. Supra asserts that an actual conflict of interest occurs when staff members in a supervisory capacity place themselves in a situation inherently conducive to divided loyalties. Supra contends that in the present circumstance, there was a secret relationship between the staff member and the BellSouth employee which benefitted BellSouth, as evidenced by the staff member sending BellSouth cross-examination questions in Docket No. 001097-TP. Supra further contends that it therefore follows that the same misconduct occurred in this docket, which presented BellSouth with the opportunity for pursuing a different strategy or course of action in this docket. Supra asserts that it need not prove that the same misconduct occurred in this docket to obtain the relief sought. Supra alleges that it is very reasonable to conclude that the staff member continued to have improper communications with BellSouth in this docket because so long as this staff member remained undetected, the staff member had no reason to refrain from engaging in the same conduct engaged in before the evidentiary hearing in Docket No. 001097-TP.

Supra further contends that if our staff had learned of the misconduct before the end of the hearing and the time Supra was notified of the misconduct in Docket No. 001097-TP, this would further substantiate the institutional bias Supra believes is already evident. Supra asserts that it is irrelevant whether this staff member worked on writing the staff recommendation in this docket because the bias and/or prejudice occurred during the entire proceeding, which includes discovery, depositions, as well as the evidentiary hearing. Supra asserts that we cannot state

with certainty that this staff member "did not leave at night with documents that she later delivered to BellSouth employees" or "did not meet with BellSouth employees after work hours to inform them of information that would compromise Supra in its litigation before the Commission."

Supra concludes that this staff member engaged in misconduct in Docket No. 001097-TP, showed bias in favor of BellSouth, had the opportunity to continue to engage in misconduct in this docket, and that the misconduct was hidden from Supra until after the close of the evidentiary hearing in this docket. Supra asserts that based on these reasons, we should conclude that the actual conflict affected the adequacy of the staff's representation and impartiality in this proceeding and that Supra need not demonstrate prejudice in order to obtain relief. Supra states that it disagrees with the characterization of the misconduct as a "procedural irregularity" as well as the conclusion that the inquiry failed to disclose any prejudice. Supra agrees that we should be sensitive to the mere appearance of impropriety. Thus, Supra concludes that a rehearing is in order based on precedent established in Docket No. 001097-TP.

Over and above the alleged bias of the staff member, Supra also alleges that there is an institutional bias in favor of BellSouth. Supra contends that there was a recent incident which transpired with respect to Supra's Motion for Supplemental Authority filed on January 30, 2002, regarding the 11th Circuit's decision in MCIMetro published on January 10, 2002. Supra asserts that BellSouth filed its response stating that Supra was incorrect in stating that the 11th Circuit's decision is controlling. Supra states that in Order No. PSC-02-0159-TP, issued February 1, 2002, granting in part and denying in part its Motion to File Supplemental Authority, the word "controlling" was struck from Supra's motion as improper argument. Supra further notes that the Order states that the 11th Circuit's decision shall be properly considered. Supra states that the Prehearing Officer "unfortunately" but "very likely" relied on staff's recommendation in rendering his decision on the Motion. Supra alleges that staff simply accepted BellSouth's assertion when drafting the recommendation regarding its Motion to File Supplemental Authority and its overall recommendation in this docket. Supra alleges that staff's legal conclusion regarding the precedential effect of the Eleventh Circuit's decision is "completely false as a matter of law" and thus indicative of the institutional bias in favor of BellSouth. Supra concludes that it must be granted a rehearing of the entire proceeding in this

docket, lest it be prejudiced by the appearance of impropriety that exists in both dockets.

Finally, Supra contends that its Motion is timely filed because our General Counsel requested that it take no action until the investigation regarding the misconduct was complete. Supra states that the investigation was completed and the Order granting a rehearing in Docket No. 001097-TP was issued January 31, 2002. Supra asserts that it has only been fifteen days since the Order was issued directing a rehearing in Docket No. 001097-TP, and, as such, its Motion for Rehearing in this Docket is timely. Supra notes that its Motion for Rehearing was not filed in Docket No. 001097-TP because we ordered a rehearing in that docket.

b. Request for Appointment of a Special Master

With regard to its request for a Special Master, Supra states that the presiding officer may fashion an order to promote the just, speedy, and inexpensive determination of all aspects of a proceeding. Supra contends that ordering a rehearing is a two-part decision, with the first part requiring a determination of whether a rehearing should be granted and the second part requiring a determination as to whom will hear the case once rehearing is granted. Supra asserts that a fair, just, and inexpensive way to resolve this question is to order that a Special Master, consisting of a three member panel agreed to by both parties, be appointed to handle the entire rehearing.

Supra asserts that a good example of such a three member panel would be the arbitration panel presently hearing disputes between the parties pursuant to the parties' current interconnection agreement. Supra states that if the parties are unable to agree on the panel members, a list of qualified candidates could be submitted for our approval. Supra suggests that the Special Master would handle the case and prepare a recommendation for final disposition by a majority vote of this Commission or a Commission Panel. Supra states that it has no objection to the matter ultimately being decided by the us, after the completion of the hearing process before an independent body. Supra concludes that the answer is the appointment of a Special Master.

c. Request for Indefinite Deferral of Docket No. 001305-TP

In addition, Supra requests that Docket No. 001305-TP be indefinitely deferred from being considered at any Commission Agenda Conference until this Motion for Rehearing is ruled upon.

BellSouth contends that Supra's Motion is "replete with shrill and conclusory rhetoric" but "utterly devoid of any substance of legitimate analysis." BellSouth characterizes Supra's Motion as "nothing more than a desperate and baseless effort to postpone our vote on a Staff Recommendation with which Supra is apparently dissatisfied." BellSouth asks that we reject the Motion in its entirety.

BellSouth asserts that the primary basis for Supra's Motion is an "ad nauseam recital" of actions that allegedly occurred in Docket No. 001097-TP. BellSouth states that it addressed those matters in that docket and will not repeat its entire position in

its Response to Supra's Motion.

BellSouth asserts that Supra's Motion fails to allege any improper actions in this docket. BellSouth states that Supra's Motion offers no evidence that any improper activities took place in this docket and alleges no specific conduct by BellSouth or our staff that affected either the hearing or the Staff Recommendation. Citing Supra's Motion, BellSouth states that Supra points to nothing more than an "opportunity to prejudice Supra." BellSouth asserts that such speculation is not grounds for rehearing. BellSouth asserts that there is no evidence that the staff member in question or any other staff member made any improper contacts with BellSouth in this docket. Further, BellSouth asserts that a review of the Staff Recommendation reveals that the staff member in question did not participate in staff's evaluation of the disputed issues.

BellSouth also asserts that Supra's allegations of improper conduct are false and based on nothing more than conjecture. BellSouth offers a sworn affidavit of Nancy Sims as evidence that there is no merit to Supra's allegations of cooperation between BellSouth and our staff in this docket. In her affidavit, Ms. Sims states, among other things, that she did not have any substantive discussions with the staff member in question concerning this docket, that the only documents she ever received from this staff member were the draft cross-examination questions in Docket No. 001097-TP, and that she neither met with this staff member after hours or outside of the Commission nor had anything but a professional relationship with this staff member. BellSouth contends that we should not delay action in this docket based on "unsupported claims of possible irregularities in this docket."

BellSouth contends that Supra has filed its Motion solely for purposes of harassment and delay. Citing Order No. PSC-98-1467-FOF-TP, issued October 28, 1998, BellSouth states that we have previously found that Supra made allegations of misconduct concerning a BellSouth employee without any factual or legal support. BellSouth notes that while we denied BellSouth's request for sanctions in that case, we stated at page 10 of that order that "further pursuit by Supra of such legally and factually deficient theories shall not be considered lightly." BellSouth contends that "Supra's flagrant disregard of the Commission's previous order should not be tolerated."

BellSouth also rebuts Supra's claim that there is

institutional bias against Supra. BellSouth asserts that staff's disagreement with Supra's interpretation of the Eleventh Circuit decision cited by Supra is not proof of bias. BellSouth asserts that if disagreement with a party constitutes bias, then the staff would be considered biased against every party in every proceeding where the staff disagrees with that party. BellSouth contends that because Supra cannot demonstrate any institutional bias, Supra's request for appointment of a special master is unnecessary.

BellSouth asserts that Supra has not offered a legitimate reason for us to depart from our normal practices and procedures by delegating our authority to third parties. BellSouth alleges that Supra has, throughout this proceeding, "attempted to manufacture disputes and delays that would postpone the parties' transition from their existing agreement to the follow-on agreement."

Finally, BellSouth argues that Supra's Motion is not timely. BellSouth states that Supra, by its own admission, was aware of the issues related to Docket No. 001097-TP no later than October 5, 2001. BellSouth further states that Supra was aware of the staff member's initial assignment to this docket because it was a matter of public record and could be readily observed that this staff member was present at the September 26-27, 2001, hearing in this docket. BellSouth asserts that despite this knowledge, "Supra deliberately waited until the very last minute to make its false and outrageous claims with the obvious intent to delay the vote in this case."

2. Decision

In its Motion, Supra asks us, on the eve of hearing our staff's post-hearing recommendation in this docket, to take the extraordinary step of appointing a special master to rehear this docket because of an event that took place, and was remedied by order of the Prehearing Officer, in a separate docket involving these parties. Without seeking reconsideration of the Prehearing Officer's finding that an internal investigation disclosed no prejudice to either party, Supra asks us to ignore this finding and replace it with a finding that there was prejudice to Supra in that docket. After laying claim to prejudice which the prehearing officer in Docket No. 001097-TP expressly found to be absent, Supra bootstraps that "prejudice" across the divide between dockets into this arbitration docket. Absent evidence or even an allegation of any specific improper act by the our staff

or BellSouth in this docket, Supra asks us to find that Supra was prejudiced in this docket based on (1) its belief that it was prejudiced in the separate docket and (2) on speculation that the individuals involved in the event in the separate docket could have conspired against Supra in this docket. Supra's Motion is procedurally improper and substantively flawed.

Most importantly, Supra does not allege and does not show that any bias which they say arose in the distant complaint docket, and which it now says affects this docket, will survive presentation of the staff recommendation to us at the Agenda Conference. Assuming arguendo that our staff's recommendation were flawed, we are the decision-makers in this case, and at the time Supra presented its motion, we had not yet rendered a decision, or even considered our staff's recommendation. Put simply, because at the time of the motion there was no agency action, Supra is not an aggrieved party. It is entirely improper to seek reconsideration of our staff's recommendation because we are free to accept staff's recommendations, to accept part of staff's recommendations, or to reject staff's recommendations entirely.

As noted above, Supra's Motion calls into question the results of the internal inquiry addressed by the Prehearing Officer's order setting Docket No. 001097-TP for rehearing. However, Supra has not asked for reconsideration of that Order. Further, Supra's Motion cannot be considered as a motion for reconsideration of that order for two reasons. First, Supra's Motion was not filed in the docket in which the order was issued. Second, Supra's Motion was filed eighteen days after issuance of the Prehearing Officer's order, well past the ten day deadline established in Rule 25-22.0376, Florida Administrative Code, for reconsideration of a non-final order.

In addition, Supra's Motion is procedurally improper because it asks for rehearing based on our staff's post-hearing recommendation, rather than rehearing of our order. The rules governing administrative proceedings before us do not provide for rehearing of staff recommendations prior to our decision. In this instance, we have not yet rendered a final decision in this docket.[1] Furthermore, although Supra questions portions of the

---

[1] We addressed a somewhat similar situation in Order No. PSC-99-0582-FOF-TP, issued March 29, 1999, in Docket No. 980800-TP. In that case, we struck Supra's Exceptions/Objections

Prehearing Officer's order in Docket No. 001097-TP and alleges "institutional bias" in its Motion, it does not imply any bias on behalf of the ourselves and agrees that it would be appropriate for us to make the final determination in this matter.

Supra also argues that its Motion is timely because it was filed fifteen days after the Prehearing Officer ordered a rehearing in Docket No. 001097-TP. Notwithstanding the fact that Supra's Motion was actually filed eighteen days after the Prehearing Officer's order was issued, the timeliness of Supra's Motion cannot be established by reference to an event which took place in a separate and discrete docket. Further, given that Supra was informed of the events that occurred in Docket No. 001097-TP over four months before its Motion was filed, the timing of Supra's motion -- one day prior to our scheduled vote in this docket -- is at least questionable.

The substantive basis for Supra's Motion is also flawed. Absent evidence or even an allegation of any specific improper act by our staff or BellSouth in this docket, Supra asks us to find that Supra was prejudiced in this docket based on (1) its belief that it was prejudiced in Docket No. 001097-TP and (2) on speculation that the individuals involved in the event in Docket 001097-TP could have conspired against Supra in this docket. As to Supra's first point, the question of whether Supra was prejudiced in Docket No. 001097-TP was appropriately addressed in that docket through an internal investigation and an order of the Prehearing Officer. Supra did not seek reconsideration of the Prehearing Office's decision. As to Supra's second point, mere speculation of prejudice, absent any evidence or allegation of a specific improper act in this docket, is not a proper basis for us to require a rehearing, particularly considering the timing of Supra's request. Supra has offered no proof or even allegations of any specific act that caused it to be prejudiced in this docket. The only evidence before us is Ms. Sims' affidavit, which at least supports a finding that Ms. Sims was not involved with the staff member in question in any of the activities that Supra suggests *could* have happened. Further, our staff has affirmatively stated that the staff member in question played no role in preparing the recommendation in this docket. Supra asserts only that there was an opportunity for improper acts to take place and invites us to infer that they did indeed take

---

to staff's post-hearing recommendation as improper under the rules governing this Commission.

place. Absent proof or specific allegations of wrongdoing, however, we will not halt the processing of any of our dockets simply because those opportunities may exist.

Supra cites case law as support for its argument that the events in Docket No. 001097-TP necessarily taint the proceedings in this docket. As Supra notes in its Motion, the line of cases cited by Supra describe the analysis used in criminal cases to determine whether an attorney is ineffective due to a conflict of interest. Supra suggests that these cases are instructive. However, these cases are clearly not controlling in this administrative setting and are not on point with the facts before us. Even stretching to apply the standard set forth in the cited cases to the situation before us, Supra's Motion must fail. Reynolds v. Chapman, 253 F.3d 1337, 1342-43 (11th Cir. 2001) identifies the standard used by the courts as a two-part test under which the petitioner/defendant must demonstrate: (a) that his defense attorney had an actual conflict of interest; and (b) that this conflict adversely affected the attorney's performance. To satisfy the first part of the test, "a defendant must show something more than 'a possible, speculative, or merely hypothetical conflict." Id. Even if Supra could satisfy this part of the test using its strained analogy of staff to the defense attorney and Supra to the defendant, it has not demonstrated in any way that it can satisfy the second part of the test - that any conflict of interest adversely affected staff's performance in this docket.

Perhaps the weakest leg upon which Supra elects to stand is the notion that because our staff does not embrace Supra's analysis of the 11th Circuit's decision in MCIMetro, there must be "institutional bias" against Supra. Neither Supra, nor BellSouth, nor our staff can advance an infallible legal argument. The affect of the 11th Circuit's decision is debatable as is evidenced by the prehearing officer's decision permitting briefs on that specific issue. Disagreement as to the interpretation and application of the case is, however, not proof of bias.

Finally, although Supra seeks a rehearing before some entity other than staff, the hearing which has already been afforded the parties was before us, the Commission. We are the same entity before which Supra says it is content submitting the results of a special master or the like for final decision. Again, it serves to note that the Commission before whom the hearing was had -- before whom witnesses were sworn and before whom evidence was

presented -- is the decision-maker in this case.

In summary, Supra has bootstrapped imagined bias into this record upon pure speculation devoid of any alleged overt or covert act; it has failed to associate that imagined bias in any way to the only decision-makers in this case - us, the Commission; and it has set upon this course prior to any decision affecting its substantial interests.

For the reasons stated above, Supra's Motion for Rehearing, Appointment of a Special Master, and Indefinite Deferral, is hereby denied.

B. Renewed Motion for Indefinite Stay and In the Alternative Renewed Motion for Oral Argument/Motion for Oral Argument on Procedural Question

1. Arguments

On February 21, 2002, Supra filed a Motion again requesting oral argument on staff's recommendation originally filed on February 7, 2002, in this Docket. Supra contends that it filed the request for oral argument pursuant to Rule 25-22.058, Florida Administrative Code.

In its Motion, Supra also responds to BellSouth's brief filed in accordance with Order No. PSC-02-0202-PCO-TP. Therein, Supra disputes BellSouth's contention that Section 364.162(1), Florida Statutes, is applicable to this case and, instead, contends that our proper role is merely that of a rate regulator.

On February 27, 2002, Supra filed a Motion for Oral Arguments on the Procedural Question Raised by the Commission Staff and the Wrongful Denial of Due Process. Therein, it again argued that this Docket should be set for re-hearing.

In its response, BellSouth contends that Supra's February 21, 2002, Motion is, in its entirety, an improper pleading in that it is a response to BellSouth's brief filed in accordance with Order No. PSC-02-0202-PCO-TP. BellSouth contends that Order No. PSC-02-0202-PCO-TP did not contemplate reply briefs. Furthermore, BellSouth contends that even if the motion could possibly be considered proper, it is nevertheless untimely, because it was not submitted with the original pleadings upon which oral argument is now requested. Finally, BellSouth notes that it cannot understand how the motion can be "renewed," when

the original motions had yet to be fully addressed by us. For these reasons, BellSouth believes the motion should be rejected as an improper pleading designed "for the purposes of delay and harassment." Opposition at 3.

In response to Supra's February 27, 2002 Motion, BellSouth argues that rehearing of this matter is not proper and that Supra's constitutional due process rights have not been violated.

2. Decision

Supra's February 21, 2002, Motion, including its alternative request for relief, is not only premature, in that we have yet to rule on the original requests for relief, it is also an improper pleading not contemplated by Order No. PSC-02-0202-PCO-TP, our rules, or the Rules of Civil Procedure.

Even if we were to accept the pleading, the arguments raised therein merely restate previous arguments regarding the effect of the 11th Circuit's decision in MCIMetro, with the added claim that, contrary to BellSouth's assertions, Section 364.162(1), Florida Statutes, does not authorize us to act with regard to disputes arising out of approved interconnection agreements. The plain language of Section 364.162(1), Florida Statutes, states, in pertinent part, that:

> The Commission shall have the authority to arbitrate any dispute regarding interpretation of interconnection or resale prices and terms and conditions.

The Legislature did not differentiate between disputes arising before an agreement has been approved and those arising out of an approved agreement. The specific language says "any" dispute. Furthermore, we weigh heavily the use of the term "interpretation" in this provision. Were we constrained only to resolving disputes prior to the parties entering into an agreement, there would be little opportunity for "interpretation" of any rates, terms, and conditions; rather, we would be charged with establishing and defining the initial rates, terms, and conditions. As set forth in Webster's II New Riverside University Dictionary, the term "interpret" means to explain the meaning of something. In establishing a new agreement between carriers through arbitration, we do not "explain" new terms for the parties--we set them.[2]

As for Supra's February 27, 2002, Motion, that request is

granted to the extent that oral argument was allowed. Otherwise, it is denied based on similar rationale set forth in Section I.A. of this Order. In addition, we reject Supra's contention that its due process rights will be abrogated if we take action at this time.

II. ARBITRATED ISSUES

A. Agreement Template

The issue before us is to determine which agreement template shall be used as the base agreement into which our decisions on the disputed issues will be incorporated. The dispute is whether BellSouth's most current agreement template, or the parties' existing agreement, should be the basis for the follow-on agreement.

1. Arguments

BellSouth witness Hendrix asserts that the BellSouth standard template agreement is the proper place to start the parties' negotiations. He states, "many ALECs, including AT&T, realized that their existing Interconnection Agreement was out of date and agreed to use the BellSouth standard template as a blue print for beginning negotiations for their new agreements." Witness Hendrix also states that "BellSouth believed that using the AT&T Agreement as the base agreement or template would be difficult at best." He goes on to state that:

> In general, the law has changed substantially since the passage of the 1996 Act. FCC and state Commission orders have clarified the rights and obligations of the parties. Based upon these changes and upon the experience BellSouth has gained in implementing the 1996 Act over the last five years, BellSouth's internal processes have been modified substantially as well. Supra intends to require BellSouth to maintain the

---

[2]See Verizon v. Jacobs, Case No. SC01-323 (Fla. 2002)(*subject to motions for rehearing*), wherein the Court emphasized that under Florida rules of statutory construction, the language of the statute must be given its plain and ordinary meaning, and there is no need to resort to other rules of statutory construction when the language is clear and unambiguous.

> outdated processes simply to support Supra's agreement, when such processes have been updated for all other CLECs. While it is impossible to list all the changes that BellSouth has made to its agreement since the AT&T Agreement was negotiated, below are some of the more prominent changes.

Witness Hendrix speaks to some of these changes in the same exhibit. In that exhibit, witness Hendrix notes changes to the following sections or attachments to the agreement: General Terms and Conditions, Resale, UNEs, Collocation, Local Interconnection, Billing, Disaster Recovery Plan, and Number Portability.

Witness Hendrix explains that BellSouth was aware that Supra wished to use the parties' existing agreement as a starting point for negotiations. However, witness Hendrix states, ". . . we explained to Supra that there were many changes that had taken place in the agreement, there were many rulings that had been issued." BellSouth asserts that the existing agreement does not reflect the changes that have taken place in the industry based on various arbitrations and rulings. Witness Hendrix then states, "to go on and use an agreement that is outdated that is reflective of the time that the parties negotiated that agreement is, in BellSouth's mind, not appropriate."

Witness Hendrix believes that even though Supra witness Ramos identifies eight reasons to use the current agreement, "he fails to identify any reason not to use the two templates that BellSouth offered to Supra as the basis for beginning negotiations." Witness Hendrix contends that BellSouth offered to begin negotiations with Supra using either the standard interconnection agreement or the current working draft of the agreement BellSouth was using in negotiations with AT&T. Those agreement templates were offered to Supra in March 2000 and July 2000, respectively. Witness Hendrix states that the BellSouth/AT&T working draft is the agreement that was filed with BellSouth's Petition for Arbitration on September 1, 2000, in accordance with Section 252(b)(2)(A). He also states that:

> It was not until June 18, 2001, that Supra proposed any contract language to this Commission, and what Supra then proposed was simply a redline of the General Terms and Conditions of its existing Agreement. It has yet to propose language for the Commission to consider for the 14 attachments associated with its proposed agreement.

Furthermore, BellSouth witness Hendrix contends that "Supra has refused to specify what in the BellSouth proposed Interconnection Agreement it does not agree with, nor has Supra proposed an Interconnection Agreement to us clearly showing the Parties' unresolved issues." He asserts that:

> BellSouth is the only party to this proceeding that has filed an Interconnection Agreement for approval by the Commission. This was done when BellSouth filed its Petition for Arbitration.

BellSouth witness Hendrix believes that by not identifying the specific terms of BellSouth's proposed Interconnection Agreement that it disputes, "Supra failed . . . to cooperate with the State commission in carrying out its function as an arbitrator." Witness Hendrix contends that Supra has failed to provide information that is necessary for us to resolve this issue. As such, he believes that BellSouth's proposed Interconnection Agreement should be approved as the baseline for the BellSouth/Supra Interconnection Agreement.

Supra witness Ramos asserts that the parties' negotiations of a follow-on agreement should begin with the current agreement. As such, witness Ramos offers several reasons why the current agreement is the proper base for negotiation. Witness Ramos contends that "Supra has commenced the implementation of its Business Plan based on the Current Agreement, and should be entitled some continuity, particularly where the vast majority of the terms and conditions remain unchanged by any subsequent order or rule." In addition, witness Ramos argues that the follow-on agreement should promote continuity with regard to the types of service and cost of those services to Supra's customers. Witness Ramos offers several additional reasons in support of this position which appear in a June 7, 2000, letter, in which Supra's counsel stated that:

> As stated above, Supra Telecom wishes to execute an agreement which, except for expiration date, would retain the exact terms as our current interconnection Agreement. The time period for this new agreement can be three years. However, after negotiations between AT&T and BellSouth have concluded, Supra Telecom may then choose to opt into that agreement. We do not see why this request should create any problems for BellSouth since the current agreement was obviously

> acceptable to BellSouth when originally negotiated with BellSouth. Moreover, the current Agreement has already "passed muster" with the Florida Public Service Commission ("FPSC") and has been the subject of various FPSC rulings that clarify various provisions and memorialize current Florida law on the various subject.[sic] Moreover, incorporating the terms of the prior agreement into a new agreement will make negotiation of a new agreement quick and simple; thereby creating [a] "win-win" situation for everyone. Although Supra Telecom would prefer entering into the same agreement again, if you believe that there are some terms in the current agreement which require modification or updating to bring the agreement in line with recent regulatory and industry changes, we would be happy to consider any proposed revisions. In any event, to avoid any delay, we can agree to negotiate such revisions by way of an amendment at a later date. (emphasis added)

Supra witness Ramos believes that because BellSouth wants to begin from an entirely new agreement, Supra has been placed in an unfavorable bargaining position. Furthermore, witness Ramos contends that there have been other follow-on agreements in which the parties used the current agreement as a starting point or simply extended the term of the agreement. He argues that BellSouth and MCI used their existing agreement as a starting point for negotiations when drafting the parties' follow-on agreement. Witness Ramos also suggests that "BellSouth's argument that 'practices have changed, the controlling law has changed, and the interconnection offerings, terms and conditions that are available have changed' is without merit." In support, witness Ramos asserts that "[t]he Act, which is the controlling law in this instance, has neither been changed nor amended since its passage in 1996." Furthermore, witness Ramos asserts that BellSouth's reasoning is "flawed, and disingenuous" as the parties existing Agreement has been amended to reflect changes in the law. He also argues that "it would simply be a matter of inserting or deleting provisions in that agreement to make it reflect the current state of the industry."

Supra argues that the parties' existing agreement should be the basis for the follow-on agreement. However, Supra witness Ramos confirms that Supra did not attach a competing version of the existing agreement with modifications, or any other agreement, with its response to BellSouth's petition for

arbitration. He also confirms that Supra has not filed a complete proposed agreement in the proceeding. All Supra has provided is an attachment containing a redlined version of the general terms and conditions.

Supra witness Ramos asserts that "Supra is eager to enter into a Follow-On Agreement . . . ." In fact, witness Ramos goes so far as to state, "Supra does not wish to continue operating under an agreement that has been the subject of a number of disputes between Supra and BellSouth . . . ." He then states:

> What Supra seeks in the follow-on agreement is clarity as well [as] parity and to be able to incorporate whatever new FCC rules that are out there that need to be filed in the agreement as well as FPSC orders that go to be [sic] with that agreement. Supra seeks to have all that there.

2. Decision

We believe that any agreement should represent the current state of the industry and reflect any changes in the law. This is especially true when the parties' existing agreement has expired and a follow-on agreement is being contemplated. Supra wants to use the parties' existing agreement, but on the other hand, does not want to operate under an agreement that in the past has created disputes between these parties. Supra witness Ramos contends that the Act "has neither been changed or amended since its passage . . . ." However, throughout his testimony he clearly contemplates that change in one form or another has taken place since 1996.

The record indicates that BellSouth presented Supra with several options as negotiations between the parties began. BellSouth offered to begin negotiations from the standard template or use the most recent version of the working draft of the BellSouth/AT&T agreement which was still being negotiated. Based on the record, we believe that BellSouth never intended to exclude the parties' existing agreement as an option. Instead, it appears that given changes in the law and the difficulties created in other recent follow-on agreement negotiations, BellSouth offered what it did to alleviate some of the same problems when negotiating the Supra agreement. Moreover, it appears from the testimony that BellSouth believed that Supra would adopt the AT&T agreement once it was final. This very possibility was alluded to in the June 7, 2000, letter from Supra's counsel to BellSouth.

Of significance here is that BellSouth is the only party that produced a complete agreement in this record -- in other words, an agreement which represents the current state of the industry and interpretation of the Act. The record reflects that BellSouth offered Supra several options as a starting point for negotiations and filed a complete, updated version with its petition. Apparently the options proposed by BellSouth were unacceptable to Supra. Even though Supra witness Ramos stated that Supra was "eager" to finalize a follow-on agreement and that his company did not want to operate under an agreement that had created many disputes between the parties, Supra did not produce an alternative agreement until after the hearing began. That agreement was the parties' existing agreement, the BellSouth/AT&T agreement, which was adopted by Supra on October 5, 1999, without any updates.

The parties have been given ample opportunity to either reach a decision on which of the proposed agreements to use as the basis for the follow-on agreement or to make the necessary changes to the existing agreement. To our dismay, they have been unable to accomplish either.

BellSouth's most current template agreement, filed with their petition for arbitration, is the only interconnection agreement produced in its entirety as part of this arbitration. Supra has not produced a complete, alternative interconnection agreement in this proceeding for our consideration. The record in this docket does not support using the parties' existing agreement as a basis for the follow-on agreement. As such, BellSouth's most current template agreement shall be used as the base agreement of the follow-on agreement, and into which our decisions on the disputed issues will be incorporated.

B. Appropriate Forum for the Submission of Disputes Under the New Agreement

1. Arguments

BellSouth witness Cox, in adopting the testimony originally filed by BellSouth's John Ruscilli, asserts that the appropriate regulatory authority should resolve disputes, and that BellSouth should not be precluded from petitioning this Commission for resolution of disputes under the interconnection agreement. She believes that commercial arbitration has proven to be an

impractical, time-consuming and costly way to resolve interconnection disputes. In her estimation, this Commission is more capable of handling disputes between telecommunications carriers than are commercial arbitrators. She believes this stems from the difficulty in finding arbitrators that are sufficiently experienced in the telecommunications industry so that decisions can be made expeditiously and without having to train the arbitrators on the very basics of the industry. Witness Cox is also concerned from a public policy perspective that it is critical that interconnection agreements be interpreted consistently. She believes this goal cannot be reached without a means to insure that similar disputes arising under different agreements are handled in a similar fashion. She states that our control of dispute resolution ensures that disputes between two carriers that potentially affect the entire industry are dealt with consistently.

In its brief BellSouth also claims that we lack the authority to compel it to go to a third party to resolve a dispute that falls within our jurisdiction. BellSouth cites our Order No. PSC-01-1402-FOF-TP, issued June 28, 2001, wherein we observed that "nothing in the law gives us explicit authority to require third party arbitration." Id. at p. 111. BellSouth asserts that it does not wish to waive its right to have us hear disputes.

In its supplemental brief filed February 19, 2002, BellSouth contends that the BellSouth Telecommunications, Inc. v. MCImetro Access Transmission Services, Inc., et al., 2002 U.S. App. Lexis 373 (11th Cir. 2002) (MCIMetro) decision is not "controlling" authority for the issues that have been presented to us for decision. At most, emphasizes BellSouth, the 11th Circuit's decision in MCIMetro stands for the proposition that, under that court's interpretation of federal law and Georgia law, the Georgia Public Service Commission (GPSC) has no authority to interpret or enforce the terms of the agreement between BellSouth and MCIMetro. BellSouth believes the Court did not consider the issue of whether we have jurisdiction, under Florida law, to resolve disputes arising out of an interconnection agreement. BellSouth also maintains that the 11th Circuit did not address, even indirectly, the issue of whether a state commission could compel parties to submit to binding commercial arbitration. Finally, BellSouth argues that we are not limited to choosing between the parties' proposed language for the new interconnection agreement, but may exercise our independent judgment to refrain from imposing either parties' proposed language addressing this issue.

Specifically, in arguing that the MCIMetro case did not address our authority under Florida law to resolve contract disputes, BellSouth concedes that the 11th Circuit concluded both that the 1996 Act did not expressly provide for a state commission to resolve disputes arising after an interconnection agreement was approved and that no such authority should be implied from the federal Act:

> The plain meaning of [47 U.S.C. § 252(e)(1)], however, grants state commissions, like the GPSC, the power to approve or reject interconnection agreements, not to interpret or enforce them. It would seem, therefore, that the 1996 Act does not permit a State commission, like the GPSC, to revisit an interconnection agreement that it has already approved, like the ones in this case.

2002 WL 27099, slip op. at 6. BellSouth notes that the 11th Circuit's posture conflicts with that of six other Courts of Appeal, as well as the Federal Communications Commission.

However, states BellSouth, the 11th Circuit's analysis of the 1996 Act is not necessary to resolve Issue B of this docket, because the Court expressly found that a state commission's authority may be found in an analysis of state law. 2002 WL 27099, slip op. at 9 ("Having determined that the GPSC has no power under federal law to interpret the interconnection agreements, we must now consider whether there is some other appropriate basis for the GPSC to interpret these agreements.") BellSouth points to Section 364.162, Florida Statutes, as giving us express authority to interpret and enforce interconnection agreements between ILECs and ALECs. According to BellSouth, the statute specifically grants this Commission "the authority to arbitrate any disputes regarding interpretation of interconnection or resale prices and terms and conditions." Fla. Stat. § 364.162(1). BellSouth believes this grant of authority includes the authority to interpret such terms and conditions when they are included within an interconnection agreement.

BellSouth also notes that the 11th Circuit in MCIMetro based its decision on a finding that the Georgia Commission was merely a "quasi-legislative body" unsuited to hear contract disputes. 2002 WL 270999, slip op. at 9-11. BellSouth believes that under Florida law, however, we exercise quasi-judicial authority when such authority is delegated to us by the Florida legislature. As

in Southern Bell Tel. and Tel. Co. v. Florida Pub Serv. Comm'n, 453 So.2d 780, 781 (Fla. 1984)(statute authorizing us to adjudicate contract disputes concerning toll revenue was a "proper assignment of quasi-judicial authority" pursuant to Fla. Const. art. V, 5 1), BellSouth asserts that the express authority under Section 364.162, Florida Statutes, to resolve "any dispute regarding interpretation" of the terms and conditions of interconnection or resale is also "a proper assignment of quasi-judicial authority" under the Florida Constitution.

In addition, BellSouth believes that Supra lacks legal support for its position that BellSouth could be compelled to submit to binding arbitration. BellSouth cites the U.S. Supreme Court holding that "[a]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." AT&T Technologies v. Communications Workers of America, 475 U.S. 643, 648, 106 S. Ct. 1415, 89 L.Ed.2d
648 (1986) (emph. added by BellSouth). BellSouth asserts that we also addressed this issue in the recent AT&T/BellSouth arbitration, where we concluded that "nothing in the law gives [the Commission] explicit authority to require third party arbitration." Order No. PSC-01-1402-FOF-TP (June 28, 2001) at p. 111. Thus, says BellSouth, we cannot force BellSouth to give up legal rights and submit to binding commercial arbitration.

BellSouth further argues that we are not obligated to choose between the options presented to us by the parties. Rather, contends BellSouth, "the Florida Public Service Commission is required by Florida's statutes and case law to reach its own independent findings and conclusions based upon the record before it." *Citing* International Minerals & Chemical Corp. v. Mayo, 217 So.2d 563, 566 (Fla. 1969)[3]. On this point, BellSouth also challenges Supra's reliance upon MCI Telecom. Corp. v. BellSouth Telecom., Inc., 112 F. Supp. 2d 1286 (N.D. Fla. 2000), for the

---

[3]*Also citing* Kimball v. Hawkins, 264 So.2d 463, 465 (Fla. 1978)(noting "legislative intent to extend broad discretion to the Public Service Commission in making its decision"); Gulf Electric Cooperative, Inc. v. Johnson, 727 So.2d 259 (Fla. 1999)(affirming our decision not to impose territorial boundaries); and Fort Pierce Utilities Authority v. Beard, 626 So.2d 1356 (Fla. 1993)(Public Service Commission properly exercised independent judgment to reject parties' joint petition for approval of territorial agreement).

proposition that we must adopt Supra's proposed language. BellSouth believes that case actually leads to the opposite conclusion. There, notes BellSouth, the court held that while we cannot refuse to consider an issue before it for arbitration, but did not conclude that the we are required to adopt the proposals of either party. "Had the Florida Commission decided, as a matter of discretion, not to adopt such a provision, MCI would bear a substantial burden in attempting to demonstrate that the determination was contrary to the Telecommunications Act or arbitrary and capricious." 112 F. Supp. 2d at 1297. Therefore, asserts BellSouth, we are entitled to take into consideration all of the evidence and applicable law and decide the manner as it sees fit, as long as our decision is neither arbitrary nor capricious.[4]

Supra's current agreement with BellSouth provides for commercial arbitration, and Supra believes that this method of resolving disputes has proven its worth by providing judicial economy, the ability to award damages, due deference to the precedence of our orders, and the speedy, efficient resolution of disputes. Supra witness Ramos argues that BellSouth's position is based on nothing more than the fact that BellSouth has received unfavorable results before commercial arbitrators. He points out that in order to resolve disputes, commercial arbitrators consider the terms and conditions of the parties' agreement in conjunction with all applicable federal and state rules, just as we would do. The difference, notes witness Ramos, is that commercial arbitrators have the ability to award damages, whereas we do not. Given the parties' tumultuous relationship, Supra believes that it is important to have a venue that provides for the quick and expeditious resolution of issues, without running to us at every turn. In the parties' current agreement the commercial arbitrators must resolve the complaint within 90 days unless there is an explicit agreement to waive the 90-day requirement. More importantly, says witness Ramos, the commercial arbitrator's award is final.

The witness contends, however, that before the Public Service Commission, parties may litigate the issue, then seek reconsideration of the Final Order, and then avail themselves of the appellate process. Witness Ramos states that our procedure is a much longer process than a commercial arbitration proceeding

---

[4] *Also Citing* Order No. PSC-01-0824-FOF-TP, issued in Docket No. 000649-TP, *MCI/BellSouth Arbitration Final Order*, wherein we declined to impose limited liability provisions.

as contained in Attachment 1 of the parties' current agreement. Witness Ramos also notes that in his testimony, BellSouth witness Ruscilli acknowledges that this Commissions decision would be appealable, and we could resolve the matter only by ordering remedies within our power. Finally, witness Ramos believes

> . . . public policy dictates that taxpayers money should not be used to finance a party's noncompliance with an agreement approved by the PSC based on the CPR rules and the parties' current agreement, the losing party pays the cost of the arbitration proceeding. Whereas, any proceeding before the FPSC, it is the taxpayers that have got to fund the bill.

In its supplemental brief, Supra first argues that as of January 10, 2002, the MCIMetro decision became binding authority in the 11th Circuit.[5] As such, Supra contends, the Court's determination that ". . . the 1996 Act does not permit a State commission, like the GPSC, to revisit an interconnection agreement that it has already approved . . . " is binding upon us and precludes Commission action on this matter. Id. at p. 26. (Emphasis added by Supra) Supra believes this clearly indicates that we cannot revisit interconnection agreements it has approved pursuant to the Act. Thus, Supra maintains, the only possible remaining jurisdictional authority upon which we could rely is Florida law.

Supra asserts that in construing statutory provisions, one must first look to the plain meaning of the language used.[6] Supra believes Florida law, in particular Chapter 364, Florida Statutes, is silent on whether we have the authority to adjudicate a dispute involving an interconnection agreement that has already been approved by this Commission. Thus, Supra maintains that consistent with the MCIMetro decision, no such authority exists. Supra notes that the 11th Circuit Court rejected any implication of "general authority" over all telecommunications providers in the state as a basis for our adjudication of disputes.

> Nothing in the Georgia Act gives the GPSC the right to interpret a contract between two parties, just because

---

[5]*Citing* Martin v. Singletary, 965 F.2d 944,945 n.1 (11th Cir. 1992).

[6]*Citing* Harris v. Garner, 216 F.3d 970, 972 (11th Cir. 2000).

> the two parties happen to be certified telecommunications carriers.

MCIMetro at p. 42. As such, Supra believes general authority is not a substitute for specific statutory authority to adjudicate disputes involving previously approved interconnection agreements. Supra also notes the Court's opinion that as a functional matter, judicial forums - and not quasi-legislative regulatory bodies - are better suited for the purely legal exercise of construing the terms of interconnection agreements. Id. at 42-43.

Supra further asserts that the 11th Circuit could find no provision in the Georgia statutes which provides support for any adjudicatory powers. Likewise, says Supra, each provision of Chapter 364, Florida Statutes, focuses this Commission's regulatory role, but nowhere are we given the power to adjudicate contractual disputes involving previously approved interconnection agreements. Supra contends that the Florida legislature "said what it meant" when it used the terms "regulatory" and "regulating," and as noted by the 11th Circuit, "given a straightforward statutory command, there is no reason to resort to legislative history."[7]

In addition, Supra argues that the 11th Circuit in MCIMetro also undertook a "functional" test, which the Court addressed as follows:

> Another section of the Georgia Act underscores this distinction. Section 46-5-168(f) . . . allows the GPSC to petition, intervene or otherwise commence proceedings
> before the appropriate . . . courts . . . There would be no need for the GPSC to commence a proceeding in a court of law, however, if it had the authority to adjudicate those proceedings itself.

Id. at pg. 42. (Emphasis added). Supra argues that Section 364.015, Florida Statutes, imposes the same substantive restrictions on this Commission where it provides that:

---

[7]*Citing* United States v. Steele, 147 F.3d 1316, 1318 (11th Cir. 1998); and CBS Inc. v. PrimeTime 24 Joint Venture, 245 F.3d 1217, 1222 (11th Cir. 2001).

> The legislature finds that violations of commission orders or rules in connection with the impairment of . . . service, constitutes irreparable harm for which there is no remedy at law. The Commission is authorized to seek relief in circuit court . . . .

According to Supra, application of the 11th Circuit's "functional" test to Section 364.015, Florida Statutes, clearly demonstrates that if we had the authority to enforce our orders or rules, then we would not need to seek relief in circuit court. Thus, under the "functional" test, this Commission must not have jurisdiction to do so. Supra contends, however, that we are confined in circuit court to matters involving the violation of a rule or statute, and that contractual disputes involve no such violations.

Supra further emphasizes that under the 11th Circuit's MCIMetro decision, it is clear that a state commission can only adjudicate those matters which it has the ability to enforce. Because we can only penalize a telecommunications company for violation of a statute, rule, or order, pursuant to Section 364.285, Florida Statutes, and must seek enforcement of our decision elsewhere, Supra believes it is clear that in this matter, we are without authority to adjudicate disputes arising out of the approved interconnection agreement. Supra also maintains that Rules 25-22.036 and 28-106.301, Florida Administrative Code, also do not authorize us to act because the breach of an interconnection agreement does not constitute the breach of a statute, rule, or order. Thus, Supra concludes that we cannot find authority to resolve complaint in Florida law.

Finally, Supra contends that Section 364.07, Florida Statutes, does not authorize us to adjudicate disputes, because this provision only pertains to contracts involving the "joint provision of intrastate interexchange service." Supra argues that this provision further crystalizes our lack of authority to adjudicate interconnection disputes, because the Legislature saw fit to include adjudicatory authority in one provision, Section 364.07, Florida Statutes, and declined to do so in another provision more pertinent to the matter at issue here, Section 364.162, Florida Statutes.

2. Decision

Supra's current agreement with BellSouth provides for